Nos. 89-1027 and 89-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK & WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
Respondents.

CSX TRANSPORTATION, INC.,
Petitioner,

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION TO DISMISS

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Come now American Train Dispatchers' Association and Brotherhood of Railway Carmen, [hereinafter, "union

respondents"], and respectfully move, pursuant to Rule 21, that the Writs of Certiororai entered herein be dismissed as the issue presented in those Writs has been rendered moot by recent actions of the Interstate Commerce Commission [hereinafter, "Commission" or "ICC"] in these cases which are now pending before it on remand from the United States Court of Appeals for the District of Columbia Circuit. Alternatively, the Writs should be dismissed as no longer presenting an important question of federal law which should be settled by this Court.

BACKGROUND OF MOTION

These cases resulted from appeals to the United States Court of Appeals for the District of Columbia Circuit from orders of the Commission affirming arbitration awards issued pursuant to ICC conditions attached to orders approving separate railroad control and merger cases involving the railroad petitioners herein.

Union respondents contended that the arbitrators, and the Commission in affirming their awards, had exceeded the statutory authority provided by the Congress in the Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.*, particularly sections 11341(a) and 11347 of that Act. The union respondents also contended that the ICC had applied an improper standard in reversing that part of the award in the *Carmen*'s case which had been in favor of the Carmen and, in the *Dispatcher*'s case, the Commission had deprived employees of their rights in violation of Section 2 Fourth of the Railway Labor Act, 45 U.S.C. § 152 Fourth.

The Court of Appeals ruled that because "§ 11341(a) of the Act does not grant the ICC its claimed power to override the provisions of a CBA [collective bargaining agreement] between a carrier and its employees", the ICC's decisions should be reversed and remanded with respect to the ICC's Railway Labor Act holdings "in order that the agency may determine whether further pro-

ceedings are necessary". (Petitioners' Appendix at 26a in No. 89-1028.) The court did not rule on the other issue presented to it.

The railroad petitioners herein filed petitions for rehearing with the Court of Appeals with suggestions for rehearings *en banc*. The petitions were denied (No. 89-1028, App. at 30a, 31a). The Commission filed a petition for rehearing on which consideration by the court was deferred pending release of the ICC's decision on remand (*id.* at 32a). That petition is still pending.

Following remand to it, the full Commission ordered argument by all parties to be held on January 4, 1990, on the question of ICC authority under the Act, particularly section 11347 thereof. The Commission had stated in a decision in another case issued soon after the Court of Appeals' decision had issued that it did not dispute the validity of the holding of the court in the instant cases and, indeed, claimed never to have relied upon its authority under § 11341(a) to override contracts while conceding that it had "been less than precise in articulating . . . [that] authority." *Brandywine Valley Railroad Company-Purchase-CSX Transportation, Inc., Lines in Florida*, 5 I.C.C.2d 764, 772 n.5 (1989).

On or about December 27, 1989, the petitioners filed their petitions for writs of certiorari to the Court of Appeals. These petitions were opposed by the ICC, the United States[1] and the union respondents as premature. This Court granted the petitions on March 26, 1990.

On February 9, 1990, the Commission held an open voting conference on the cases remanded to it, voted to reaffirm its authority under Section 11347 to override collective bargaining agreements and instructed its staff to prepare a written decision in accordance with its vote and its oral discussion of the cases.

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[1] The United States declined to take a position in either case before the Court of Appeals.

At a May 15, 1990 open voting conference involving a number of cases, the Commission voted unanimously to adopt its staff's sixty-page written decision on remand and to release the decision to the public as soon as it had been readied for distribution.

On May 17, 1990, the Commission published a news release announcing the results of the May 15, 1990 voting conference. According to the news release, a copy of which is appended to this motion, the Commission is taking a "new approach" to the issues before it in these cases and in "light of the new approach stated in its decision [not yet released], the Commission reversed and vacated the two arbitration awards under review in these cases and remanded them for further negotiation by the involved parties and for consideration by arbitrators if necessary in accordance with the decision."

ARGUMENT

The case before this Court arose from two Commission decisions affirming two arbitration awards. The Commission on remand from the Court of Appeals has now, according to its news release, reversed and vacated those same arbitration awards and remanded the cases to the petitioner railroads and union respondents for further negotiation and later consideration by arbitrators, if necessary. This action of the ICC has effectively mooted the issue before this Court as to all parties. *Cf. Piccirillo v. New York*, 400 U.S. 548, 549 (1971).

The Commission indicates that it had determined from a study of the relationship between the Interstate Commerce Act and the Railway Labor Act over the past 50 years and in accordance with the practice between 1940 and 1980 growing out of the Washington Job Protection Agreement, that "collective bargaining agreements could be modified under 49 U.S.C. 11347 and the ICC's employee-protection conditions, but only with respect to the selection of work forces and the assignment of employees

—with some qualifications—and only to the extent necessary to permit the carrying out of a merger or consolidation". The Commission also concludes that "[e]mployees' contract rights are otherwise to be preserved and their traditional right to bargain over rates of pay, *rules*, and *working conditions* is not to be undermined". (Emphasis supplied.)

The Commission evidently has determined that regardless of what may be this Court's ruling on the issue pending before it, it is section 11347, not section 11341(a), that governs and restricts its actions in merger and control cases with regard to employees' contract and Railway Labor Act rights.

This "new approach", in the Commission's words, has constrained it to reverse and vacate the arbitration awards which it had previously affirmed and remand the cases for negotiations between the respective railroad and union parties. If the parties are unable to resolve their differences by negotiation, arbitration will be ordered. However, those negotiations and that arbitration will be conducted against the background of the ICC's "new approach" to the goveranance and restrictions of section 11347.

The existing differences between the railroad petitioners and union respondents may be eliminated by negotiations or arbitrations or review of the arbitrations by the ICC.[2] If not, the pending Commission petition for rehearing before the Court of Appeals could be reactivated. In any event, the issue of the meaning and effect of section 11341(a) is no longer material to the pending disputes which, if they remain unresolved, will again be before this Court on the issue of the Commission's authority under section 11347. Finally, it is this new approach of Commission reliance on section 11347, instead

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[2] Any existing differences between union respondents and respondent ICC involving the effect of section 11341(a) upon collective bargaining agreements were eliminated when the ICC issued its *Brandywine* decision, *supra*, page 3.

of section 11341(a), that will govern all future railroad merger and control cases arising under the Intertsate Commerce Act, unless changed by a future ruling of this Court on a future review of these actions of the ICC.

Additionally, even were one to conclude that the recent actions of the Commission have not rendered wholly academic the issue of the effect of section 11341(a) as authority to override collective bargaining agreements, those actions certainly have drained the cases as currently presented to this Court of any general importance for future railroad merger and control cases approved pursuant to the Interstate Commerce Act. *Cf. Triangle Improvement Council, et al. v. Ritchie, et al.*, 402 U.S. 497, 499 (1971).

CONCLUSION

For these reasons, union respondents respectfully submit that the issue now before this Court on writs of certiorari has been rendered moot by the recent actions of the Commission or, at the least, has lost any stature as an important question of federal law that this Court should decide and that the writs now should be dismissed.

Respectfully submitted,

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Date: May 24, 1990

APPENDIX

APPENDIX

INTERSTATE COMMERCE COMMISSION
ICC NEWS
12th & Constitution Avenue N.W.
Washington, D.C. 20423

FOR RELEASE
Thursday, May 17, 1990
No. 90-67

Contact: Dennis Watson
(202) 275-7252

ICC ISSUES RESULTS OF MAY 15
VOTING CONFERENCE

Interstate Commerce Commission Chairman Edward J. Philbin has announced the results of the Commission's May 15 voting conference in several railroad cases.

The cases and respective voting results are described in the sequence in which they were considered and voted upon by the Commission.

• Finance Docket No. 31532, *Indiana Hi-Rail Corporation—Lease and Operation Exemption—Norfolk and Western Railway Company Line Between Douglas, OH and Van Buren, IN*, involving the issue of whether the Commission should grant Indiana Hi-Rail Corporation's petition for reconsideration of a 1989 Commission order denying Indiana Hi-Rail's request for exemption from the ICC's tariff-filing and reporting requirements. The Commission, voted to postpone action on the petition until Indiana Hi-Rail provides additional information.

• Docket No. AB-12 (Sub-No. 118X), *Southern Pacific Transportation Company—Exemption—Abandonment of Service in San Mateo County, CA*, involving the issue of whether a 1989 Commission Notice of Interim Trails Use should be revoked for an approximately 1.2-mile segment of the Southern Pacific "Ravenswood Branch" line in San Mateo County, California. The Commission voted to (1)

consider petitions of the National Association of Reversionary Property Owners and Mr. Horace Robertson seeking administrative review or reconsideration of the ICC's 1989 decision; (2) seek additional information to determine whether the segment in question is a "spur" track which falls outside the Commission's abandonment jurisdiction; and, (3) explore whether or not abandonment has been consummated in this instance.

• Docket No. AB-263 (Sub-No. 2X), *Staten Island Railway Corporation—Abandonment Exemption—In Richmond County, NY*, involving the Staten Island Railway's request for an exemption from the Commission's prior-approval regulations for the abandonment of its 3.65-mile "Travis Branch" line in Richmond County, New York. The Commission voted to grant the exemption.

• Ex Parte No. 346 (Sub-No. 26), *Association of American Railroads—Petition to Exempt Industrial Development Activities from 49 U.S.C. 10761(a), 10762 (a)(1), 11902, 11903, and 11904(a)*, involving the issue of whether the Commission should issue a notice of proposed rulemaking requesting public comment on the Association of American Railroad's (AAR) petition for a limited exemption from the anti-rebating (Elkins Act) provisions of the Interstate Commerce Act to permit railroads to engage in certain market development activities. The Commission voted generally to accept the AAR's petition for purposes of initiating an advance notice of proposed rulemaking that would include participation by the public, the U.S. Department of Justice, and the Commission's Office of Compliance and Consumer Assistance.

• Finance Docket No. 28905 (Sub-No. 22), *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, and Finance Docket No. 29430 (Sub-No. 20), *Norfolk Southern Corporation—Control—Norfolk and Western Railway Company and Southern Railway Company*, involving issues on "remand" (that is, issues for reconsideration) by the U.S. Court of Appeals for the District of Columbia Circuit.

The Commission voted to issue a decision reviewing the relationship between the Interstate Commerce Act and the Railway Labor Act in connection with the treatment of employees in mergers and consolidations over the past 50 years. The decision balances the railroads' need to expect prompt consummation of ICC-approved transactions and the rights of employees to bargain collectively over their terms of employment. The Commission ruled that, in accord with the practice between 1940 and 1980 growing out of the Washington Job Protection Agreement, collective bargaining agreements could be modified under 49 U.S.C. 11347 and the ICC's employee-protective conditions, but only with respect to the selection of work forces and the assignment of employees—with some qualifications—and only to the extent necessary to permit the carrying out of a merger or consolidation. Employees' contract rights are otherwise to be preserved and their traditional right to bargain over their pay, rules, and working conditions is not to be undermined.

In light of the new approach stated in its decision, the Commission reversed and vacated the two arbitration awards under review in these cases and remanded them for further negotiation by the involved parties and for consideration by arbitrators if necessary in accordance with the decision.

• Finance Docket No. 31530, *Wilmington Terminal Railroad, Inc.—Purchase and Lease—CSX Transportation, Inc. Lines Between Savannah and Rhine, and Vidalia and Macon, GA*, involving a request for Commission approval for Wilmington Terminal Railroad's purchase and lease from CSX of two connected rail lines—totaling approximately 224 miles—between Savannah and Rhine and Vidalia and Macon, Georgia, and the question of what type of labor-protective conditions should be imposed on the transaction.

Here, the Commission's vote clarified the obligation of buyers and sellers of railroad lines to protect and negotiate with employees affected by a line sale. In so doing, a majority of the Commission eliminated the obligation of a buyer to negotiate an implementing agreement with the employees of the seller, an obligation which had been imposed by the Commission for the first time in Finance Docket No. 31393, *Brandywine Valley R.R. Co.—Purchase—CSX Transp., Inc., Lines in Florida*, 5 I.C.C.2d 764 (1989). This clarification, based on a study of the Commission's past approach to labor protection in lines sales, requires the seller to negotiate with affected employees an implementing agreement to reflect diminished work and afford them full protection, with no penalty for failure to take any position offered by the buyer. The buyer would be required to negotiate an implementing agreement with its employees, and to discuss—but not to negotiate—with the seller's employees the basis on which the buyer would be willing to offer positions to the seller's employees.

If these requirements are followed, the Commission was of the view that implementation of the transaction would not be inconsistent with any rights or obligations to negotiate arising under the Railway Labor Act (RLA), since no collective bargaining agreements are modified. As a result, a majority of the Commission found no need at this time to issue a declaration sought by CSX to the effect that any rights to negotiate which might be believed to arise from the rail unions' service of Section 6 notices would be overridden under the provisions of 49 U.S.C. 11341(a) as a result of the Commission's approval of the transaction under Section 11344 of the Interstate Commerce Act. The rail unions have served Section 6 notices on all of the railroads collectively, and some carriers individually, including CSX, seeking to modify existing collective bargaining agreements to require a selling carrier to include in contracts of sale a provision that the purchaser would take on existing em-

ployees, collective bargaining agreements, and union representation.

The Commission also found that it was not required by Section 11347 of the Interstate Commerce Act or its own conditions to require a purchaser to assume the seller's employees, collective bargaining agreements, and union representation, as contended by certain rail labor parties. The Commission further found that no basis had been shown for imposing a preferential hiring requirement on Wilmington Terminal in this case as a matter of its own discretion. Commissioner Lamboley would have imposed a preferential hiring requirement.

The Commission did not vote in the May 15 conference on Docket No. 37626, *Consolidated Papers, Inc., et al.* v. *Chicago and North Western Transportation, et al.*, involving the issue of whether the defendant railroads have market dominance over the transportation of pulpwood and wood chips from Michigan, Minnesota, South Dakota, Wyoming, Colorado, and Montana to the midwestern mills of four Wisconsin paper manufacturers. The Commissioners instead voted by "notation" (registering their votes on paper) on several technical issues. A summary reflecting that vote was issued May 15.